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No. 91-1421

Supreme Court, U.S.

FILED

JUN 11 1992

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

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UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM F. AND LOLA E. HILL

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

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**JOINT APPENDIX**

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RICHARD B. ROBINSON  
ROBERT A. WHERRY, JR.  
*Lentz, Evans and King, P.C.*  
*2900 Lincoln Center Building*  
*Denver, CO 80264*  
*(303) 861-4154*

*Counsel for Respondents*

KENNETH W. STARR  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

*Counsel for Petitioner*

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PETITION FOR A WRIT OF CERTIORARI FILED: MARCH 6, 1992

CERTIORARI GRANTED: APRIL 27, 1992

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IN THE UNITED STATES CLAIMS COURT

No. 679-88 T

WILLIAM F. and LOLA E. HILL

v.

THE UNITED STATES

DOCKET ENTRIES

DATE	PROCEEDINGS
Nov. 29, 1988	Complaint filed
Nov 29 1988	Filing fee of \$60 paid by plaintiffs.
Nov 29 1988	Notice of assignment to Judge Roger B. Andewelt filed. Copy to parties.
Dec 12 1988	Defendant's notice of appearance filed. Service: 12/9/88.
Jan 25 1989	Defendant's motion for enlargement of time (to March 1, 1989) to respondent to complaint filed. Service: 1/25/89. ALLOWED: JAN 26 1989.
Mar 1 1989	Defendant's answer filed. Service: 3/1/89.
Apr 11 1989	Joint preliminary status report filed.
Apr 13 1989	Judge's order directing parties to complete discovery by August 30, 1989, with a joint status report due at that time filed. Copy to parties.
Aug 30 1989	Joint status report filed by defendant. Service: 8/30/89.

DATE	PROCEEDINGS
Sep 5 1989	Judge's order directing plaintiffs to file their motion for summary judgment by September 15, 1989, filed. Copy to parties.
Sep 15 1989	Plaintiffs' motion to amend complaint filed. Service: 9/14/89. APPROVED: SEP 19 1989.
Sep 15 1989	Plaintiffs' motion for summary judgment filed. Service: 9/14/89.
Sep 15 1989	Plaintiffs' proposed findings of uncontroverted facts filed. Service: 9/14/89.
Sep 19 1989	Plaintiffs' first amendment to complaint filed.
Oct 13 1989	Defendant's motion for enlargement of time (to December 14, 1989) to respond to motion for summary judgment filed. Service: 10/12/89. ALLOWED: OCT 18 1989.
Dec 12 1989	Defendant's motion for enlargement of time (to January 13, 1990) to respond to motion for summary judgment filed. Service: 12/12/89. ALLOWED: DEC 19 1989.
Jan 12 1990	Defendant's motion for enlargement of time (to January 23, 1990) to respond to motion for summary judgment filed. Service: 1/11/90. ALLOWED: JAN 12 1990.
Jan 23 1990	Defendant's motion for enlargement of time (to February 2, 1990) to submit its response to motion for summary judgment filed. Service: 1/23/90. ALLOWED: JAN 31 1990.
Jan 29 1990	Plaintiffs' response to motion for enlargement of time filed. Service: 1/26/90.
Feb 2 1990	Defendant's cross-motion for summary judgment filed. Service: 2/2/90.
Feb 2 1990	Defendant's statement of genuine issues and proposed findings of uncontroverted facts (one item) filed. Service: 2/2/90.

DATE	PROCEEDINGS
Feb 20 1990	Plaintiffs' reply brief filed. Service: 2/16/90.
Feb 20 1990	Plaintiffs' statement of genuine issues filed. Service: 2/16/90.
Mar 5 1990	Defendant's motion for enlargement of time (to March 15, 1990) to file its reply brief filed. Service: 3/5/90. ALLOWED: MAR 6 1990.
Mar 15 1990	Defendant's reply brief filed. Service: 3/15/90.
Sept 5 1990	Judge's order scheduling oral argument filed. Copy to parties.
Oct 31 1990	Judge's opinion filed. Copy to parties.
Oct 31 1990	Judgment entered that plaintiffs recover the sum of \$49,696.00 plus interest with costs to the prevailing party. Copy to parties.
Nov 1 1990	Erratum with respect to the 10/31/90 opinion filed. ["Each party shall bear its own costs."]. Copy to parties.
Nov 2 1990	Certified copy of judgment forwarded to defendant. See letter in file.
Nov 19 1990	Transcript of proceedings (1 volume) taken at Washington, D.C., on October 15, 1990, filed. Notice to parties.
Dec 28 1990	Defendant's notice of appeal filed. Copy to plaintiff and C.A.F.C. No. 91-5032.



UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT

91-5032

WILLIAM F. HILL and LOLA E. HILL,  
PLAINTIFFS-APPELLEES

v.

THE UNITED STATES, DEFENDANT-APPELLANT

DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
December 28, 1990	Notice of appeal filed by Defendant in US Claims Ct. (bah)
December 28, 1990	Notice of appeal and certified list, received. (bah)
	COUNSEL FOR THE APPELLANT: Gary R. Allen
	MOB ——— BAS ———
	COUNSEL FOR THE APPELLEE: Richard B. Robinson
	MOB ——— BAS ———
	Certificate of Interest for the Appellant, filed.
	Certificate of Interest for the Appellee, filed.
January 3, 1991	Notice of appeal and certified list, docketed. Notice sent to the parties. (bah)

DATE	PROCEEDINGS AND ORDERS
	1. BRIEF FOR APPELLANT AND JOINT APPENDIX REC'D 03/05/91. SENT REJECTION LETTER TO COUNSEL RE BRIEF FOR PETITIONER/JOINT APPENDIX FOR THE FOLLOWING REASON: NON-COMPLIANCE WITH CAFC RULE 32.E(1), 28.A(12), AND 30(4). MAILED: 03/08/91 (EOD 03/08/91) (SP) 91-5032
March 4, 1991	BRIEF FOR APPELLANT, filed. (MS-3/4) (sp)
April 11, 1991	BRIEF FOR APPELLEES, filed. (HS-4/11) (sp)
	2. APPELLANT—MOTION FOR EXT OF TIME FOR FILING BRIEF. (MS-04/18/91) FILED: 04/18/91. ACTION ON MOTION (3): GRANTED; TO AND INCL MAY 7, 1991. BY MOTIONS PANEL. JUDGE: RICH. FILED: 04/25/91. (EOD 04/25/91 BY SCG) 91-5032
April 30, 1991	4. PANEL 06I+ on June 7 CALENDAR LETTER RE ARGUMENT sent to Allen/Robinson (df) [REASSIGNED TO PANEL I+]
May 7, 1991	REPLY BRIEF FOR APPELLANT, filed. (MS-5/7) (sp)
May 7, 1991	JOINT APPENDIX, filed. (MS-3/4) (sp)
June 7, 1991	Argued. (Nies CJ, Bennett SJ and Lourie J) (atk)
September 11, 1991	AFFIRMED. (Bennett, SJ) "JUDGMENT ENTERED" (bah) NIES, <i>Chief Judge</i> , dissenting.

DATE	PROCEEDINGS AND ORDERS
	5. APPELLANT—MOTION FOR EXT OF TIME FOR FILING PETITION FOR REHEARING. (MS-09/17/91) FILED: 09/18/91. REPLY 1 (6) FILED: 09/18/91. ACTION ON MOTION (5): GRANTED, TO AND INCL OCT. 25, 1991. BY MERITS PANEL. FILED: 09/24/91. (EOD 09/24/91 BY SCG) 91-5032
October 25, 1991	APPELLANT—COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC (MS-10/25/91 FILED: 10/25/91 PETITION CIRCULATED: 10/28/91 PETITION DISPOSITION: 11/08/91 ACTION: DENIED. SUGGESTION CIRCULATED: 11/08/91 RESPONSE REQUESTED FROM: APPELLEE (U.S.) RESPONSE DUE: 12/05/91 RESPONSE FILED: 12/05/91 RESPONSE CIRCULATED: 12/09/91 SUGGESTION DISPOSITION: 12/19/91 ACTION: DECLINED. (EOD 12/19/91 BY (CS) 91-5032
November 15, 1991	MANDATE ISSUED TO THE U.S. CLAIMS COURT. (BAH)
November 20, 1991	7. Phone conversation and letter to appellee requesting a response to appellant's suggestion in banc on or before 12/5/91 (cs)
January 29, 1992	8. Extension of time to file a petition for a writ of certiorari gra 01/27/92, extending the time to and including 3/7/92 (cs)  PETITION FOR WRIT OF CERTIORARI FILED 03/06/92, SUPREME COURT #: 91-1421. (EOD 03/16/92 BY CS) 91-5032

## DEFENDANTS STATEMENT OF GENUINE ISSUES PROPOSED FINDINGS OF FACT

[5] (Pltf. Proposed Findings 6 and 8, and citations thereto, including Ex. 3 at pp. 34 and 54.)

8. On Form 4625 ("Computation of Minimum Tax-Individuals"), attached to each federal income tax return for 1981 and 1982, the plaintiffs calculated percentage depletion as a tax preference item for purposes of the minimum tax (Section 56 et seq. of the Internal Revenue Code of 1954), using the following methodology:

a. First, plaintiffs' adjusted basis for each oil and gas property prior to claiming percentage depletion was calculated by expensing intangible costs and intangible drilling and development costs, and capitalizing tangible costs recoverable through depreciation.

b. Second, plaintiffs annually reduced the adjusted basis of each property by the depreciation claimed with respect to tangibles and by the percentage depletion claimed for such property.

c. Finally, plaintiffs subtracted their remaining adjusted basis, if any, for unrecovered intangible costs and unrecovered tangible costs, for each property, as calculated above, from the percentage depletion claimed for that property during the year. The excess, if any, was reported as a tax preference item. The minimum tax so calculated and returned by plaintiffs was \$29,812 for 1981 and \$26,736 for 1982. (Pltf. [6] Proposed Finding 7, and citation thereto, including Ex. 1 at p. 13, and Ex. 2 at p. 25.)

9. The plaintiffs' method of computing percentage depletion as a tax preference item was also challenged by the IRS upon examination. The IRS, and the defendant herein, maintain that in computing the amount of percentage depletion as a tax preference item only the unrecovered intangible costs may be subtracted from the allowable percentage depletion, and not both the unrecovered intangible costs and unrecovered tangible costs, as plaintiffs maintain. (Pltf. Proposed Finding 9, and citations thereto; Compl. para. 7; plaintiffs' claim for



refund for 1981, Complaint Ex. B, and claim for refund for 1982, Ex. 9 cited in Pltf. Proposed Finding 9, and the IRS Notice of Disallowance of plaintiffs' claims for refund, Ex. 10 cited in Pltf. Proposed Finding 9, at pp. 124, 129-130.)

10. In this action, the plaintiffs maintain that the correct method of computing percentage depletion as a tax preference item, after taking into account the modifications to the percentage depletion allowable proposed by the IRS and agreed to by plaintiffs, is as follows, resulting in the stated amounts of percentage depletion as a tax preference item:

[7]

	1981	1982
1. Depletion allowable	\$439,884	\$371,636
Less: unrecovered intangible costs	—0—	—0—
Less: unrecovered tangible costs	206,545	131,216
2. Depletion as a tax preference item	\$233,269	\$240,420

(Pltf. Proposed Finding 8, and citations thereto; Deft. Proposed Findings 4-7.)

11. In this action, the defendant maintains that the correct method of computing percentage depletion as a tax preference item, after taking into account the modifications to the percentage depletion allowable proposed by the IRS and agreed to by plaintiffs, is to subtract from the percentage depletion allowable the amount of any unrecovered intangible costs—which amount in this case is zero—with no amount of any unrecovered tangible costs being allowed as a reduction. The computation and stated amounts of percentage depletion as a tax preference item are as follows:

	1981	1982
1. Depletion allowable	\$439,884	\$371,636
Less: Unrecovered tangible costs are never allowed as a reduction:	—0— —0—	—0— —0—
2. Depletion as a tax preference item	\$439,884	\$371,636

(Pltf. Proposed Findings 9, 10, and 12, and citations thereto, especially Ex. 3 at pages 79-81.)

## JOINT APPENDIX IN THE COURT OF APPEALS

[5] And that's at pages 43, 44 and 45 of my opening brief.

THE COURT: Yeah.

MR. PHILPOTT: And actually I was going to bring it up in argument. We look for a picture of the separation and depletion and depreciation items. For example, on page 45, it says, "Recovery of optional loans if tax-wise. One, items returnable through depletion;," on and on and on. It says, "Insofar as they are not presented by personal property." Then note two, it says, "Items returnable through depreciation." So, there is a separation and your question was quite relevant.

THE COURT: Okay, now. Let's talk about the intangibles that are recovered through depletion and not through deduction, not through depreciation. Are these added to the basis in calculating the adjusted basis, Defendant?

MR. PHILPOTT: Could you repeat that?

THE COURT: With respect to those intangible costs, that are not expense, and that are properly recovered through depletion, the depletion deduction—

MR. PHILPOTT: Yes?

THE COURT: Are those costs added to the basis in calculating the adjusted basis?

MR. PHILPOTT: For purposes of Section 57?

[6] THE COURT: For purposes of Section 57.

MR. PHILPOTT: I would say yes.

THE COURT: They are?

MR. PHILPOTT: Yes.

THE COURT: Okay, thank you.

MR. PHILPOTT: It's a part, what we would argue as the depletable property. Right.

THE COURT: Well, okay. Okay. I'm ready to start arguing. But let me, if I can, I want to hear from the Government first, even though Plaintiff filed first. And that's because, I think the Plaintiff's argument, well, Plaintiff can obviously state it better than I can, it's rela-

tively straightforward. It starts with—what we're trying to determine is what the proper definition of adjusted basis is. And Plaintiff points that the regulation 1.571(h) states, "For the determination of the adjusted basis of the property at the end of the taxable year, see Section 101.6 and the regulations thereunder." Okay. Section 101.6 says, "Proper adjustment should be made for expenditures properly chargeable to the capital account." Okay.

What's properly chargeable to the capital account, I'd go to 101.6-2, which says, "The costs and other basis should be properly adjusted for any expenditure properly chargeable to the capital account, including the costs of [7] improvements and betterments made to the property." So, we have adjusted basis. You include expenditures properly chargeable to the capital account. And 101.6-2 seems to say that the cost of improvements and betterments made to properties are costs that are properly chargeable to the capital account. Now, 101.6115(b)(4) seems to say, that tangible costs are improvements to the property. Okay.

So, the regulations seems to point us, the regulations do point us to 101.6. They don't indicate any exception to the rules of 101.6. And 101.6 seems to oblige the taxpayer to add the cost of improvements.

What we have here are improvements. Are they not?

MR. PHILPOTT: Yes.

THE COURT: They are improvements? Okay. So you're saying, we don't do what 101.6, from my reading, seems to say, we are obliged to do.

So, why don't you pick up from there.

MR. PHILPOTT: If Your Honor will indulge me, could I, I have fully in mind your interests—

THE COURT: Handle it the way you want to handle it.

MR. PHILPOTT: Okay. I was going to try to, since I know you're fully familiar with the issue, what is the adjusted basis of the property for purposes of tax preference

\* \* \* \*

[38] MR. PHILPOTT: You'd have to use your common sense here. I mean, to say well, hey wait a minute, this is a sort of outrageous. It's too cursory a view of 1016, after what's gone on before. And you're viewing the tax preference, the minimum tax provision in the first place. 1016 is just a general section of a Code. Income tax 101 for the first year law students and all that. It's not a specific thing. I mean, you have to bring a lot to bear on 1016. And of course, I would direct your attention to the regs, 1016-6 of that. It's quoted in my Reply Brief.

THE COURT: What do you think you'd hear from the legislative history?

MR. PHILPOTT: In this regard, the legislative history isn't all that helpful. I've set out as much of it as possible on it. It does say that 614 is new, and they did, Congress did recognize a problem if property had not been defined as well as it should have been up to that point. So, 614 is new and then when they did put in 614 property, which is the economic interest in the mineral deposits. Other than that, I just think it carries on the dichotomy between depreciation and depletion and how cautious we ought to be when we're dealing in this area, which I wouldn't say is 100 percent crystal clear. But I would say with everything that's available, it's pretty much so.

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SUPREME COURT OF THE UNITED STATES

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No. 91-1421

UNITED STATES, PETITIONER

*v.*

WILLIAM F. HILL, ET UX.

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**ORDER ALLOWING CERTIORARI**

Filed April 27, 1992

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The petition herein for a writ of certiorari to the United States Court of Appeals for the Federal Circuit is granted.

April 27, 1992